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IN THE

Supreme Court of the United States

October Term, 1949

No. 152

JOHN E. GIBBONS,

Petitioner,

vs.

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINION OF THE COURT BELOW

The *per curiam* opinion of the United States Court of Appeals for the Sixth Circuit, filed December 15, 1948, is reported in 171 F. (2d) 287.

GROUNDS ON WHICH JURISDICTION IS SOUGHT TO BE INVOKED

The petitioner's statement of the grounds upon which the jurisdiction of this court is invoked merely repeats the language of Rule 38, 5(b). The petitioner asserts that the Court of Appeals decided important questions of federal law which should be settled by this court and he cites the definition of the term "employee" in the Railway Labor Act (45 U. S. C. A., Sec. 151). However, the instant case is not one under that Act, so the definition is of only passing interest.

Again, petitioner quotes from the Railroad Retirement Act (45 U. S. C. A., Sec. 228a (d)) in two places in his petition (pp. 12, 25). The language quoted has not been in effect since the section was amended by Act July 31, 1946, Sec. 201 (60 Stat. 722, 725). In any event this case does not involve that Act and the petitioner never worked for respondent after August 29, 1935, when it was first enacted.

Petitioner also claims, in the language of Rule 38, that the Court of Appeals decided federal questions in a way probably in conflict with applicable decisions of this court. The point of conflict is not disclosed and the only decision of this court which is cited is *J. I. Case Company vs. N. L. R. B.*, 321 U. S. 332, 88 L. Ed. 762. This case is cited upon the proposition that "collective bargaining between an employer and a Union does not necessarily result in a contract of employment" (Petition, p. 25). Clearly, the decision of the Court of Appeals does not conflict with this rule.

Finally, petitioner says, again in the language of Rule 38, that the Court of Appeals departed so far from the usual course of judicial proceedings that this court should exercise its power of supervision. The nature of

the departure is not pointed out. Only three cases are cited other than the above decision of this court and none of them can be considered controlling here, so it would be impossible to depart from them.

The fact is that this case does not involve any dispute as to any principle. The decision of it turns upon the evidence in this case and this case alone. Concerning this evidence, the District Court made specific findings of fact. Upon this state of the record, the Court of Appeals said: " * * * we cannot say that its findings * * * are unsupported by the record." Granting a writ of *certiorari* is not warranted merely to review the evidence or inferences drawn from it. *General Talking Pictures Corp. vs. Western Electric Company, et al.*, 304 U. S. 175, 178, 82 L. Ed. 1273, 1275 (1938).

STATEMENT OF THE CASE

The petitioner filed this suit to recover the amount which he claims he would have earned had he not been refused employment by the respondent railroad, in violation of his alleged seniority rights. The case was removed to the United States District Court for the Northern District of Ohio, Western Division, by reason of diversity of citizenship. There, a jury was waived and the District Court found that under the terms of the application for employment, signed by the petitioner, and other evidence in the record, petitioner was only allowed to work for respondent on a temporary or probationary basis and that he held no seniority rights (R. 15, 16). Petitioner did so work for respondent during three different periods in 1929 and 1935 for approximately forty-seven days in the aggregate (R. 15). At the conclusion of this work his application for employment, which stated on its face that petitioner's employment was only temporary until it was approved,

was specifically disapproved by the General Manager of the respondent and petitioner was so notified (Ex. G, R. 173, 203, 204).

The District Court entered judgment for the respondent (R. 16), which was affirmed by the Court of Appeals for the Sixth Circuit (R. 235). The petitioner then filed his petition for a writ of *certiorari* in this court. The exhibits have not been printed in the record (R. 31), so we are compelled to refer to them by letter or number.

We believe some further statement of the case is necessary to correct inaccuracies or omissions in petitioner's summary statement. There, an effort is made to construe the evidence contrary to the construction placed upon it by the District Court, which was affirmed by the Court of Appeals. Petitioner repeatedly employs such language as "furlough," "recall" and "leave of absence" (Petition, pp, 4, 5). He thereby seeks to imply that his application for employment was approved by the General Manager in accordance with its terms, and that he held seniority rights. The District Court specifically found to the contrary and the Court of Appeals stated that "we cannot say that its findings upon this phase of the case are unsupported by the record" (R. 236).

A further illustration of the strained construction placed upon the evidence by the petitioner may be found in his assertion that from March, 1935 until July, 1940, he "repeatedly requested" additional medical examinations which were refused (Petition, p. 6), and that there was no evidence that he knew his name was dropped from the roster (Petition, p. 7). D. W. Cross, who succeeded J. F. Hazel, petitioner's friend (R. 200) and creditor (Ex. C.) as respondent's Superintendent of Motive Power, testified he did not see Gibbons between 1935, when he succeeded Hazel, and 1940 when Gibbons walked into Cross's office (R. 164). In this he was corroborated by the two other em-

ployees who worked in that office (R. 173, 204). Petitioner, on the other hand, testified he was in that office two or three times a month during this period to see about a physical examination (R. 102). It was on these occasions that he saw his name on the roster (R. 98, 99). Yet his own witness, E. F. Gensler, General Chairman of the B. of L. F. & E., produced copies of the rosters posted during this period, which showed petitioner's name wasn't there at all (R. 148, Ex. L. to R inclusive). It is obvious that petitioner's testimony was wholly lacking in credibility.

This situation further confirms the respondent's contention that a decision of this case turns on questions of fact, the credibility of the witnesses and an interpretation of the evidence rather than upon any principle of federal law. The fact is that a great many of the assertions in the petitioner's summary statement are either contrary to the findings of fact made by the District Court, or represent petitioner's interpretation of disputed evidence.

ARGUMENT

Summary of Argument

1. **The Petitioner's Employment By the Respondent Was Only Temporary Because His Application for Employment Provided That It Was To Be Temporary Until the Application Was Approved By the General Manager of the Respondent, and It Was Not So Approved But Was Specifically Disapproved.**

2. **The Requirement of Such Approval By the General Manager Was Not Waived By the Respondent Under All the Evidence in This Case Either By the Appearance of His Name on Four Seniority Rosters, By the Performance of Work By the Petitioner, or By the Delivery to Him By J. F. Hazel, Respondent's Superintendent of Motive Power, of a Recommendation for Employment Addressed "To All Concerned."**

1. The Petitioner's Employment Was Only Temporary Because His Application for Employment Was Not Approved By the General Manager of the Respondent.

The application for employment, signed by Gibbons, contained the following printed language immediately above his signature: "If put to work, I understand that my employment is only temporary until this application is approved." About one and one-half inches below Gibbons' signature is the printed word, "Approved:" and a line beneath which are the words "General Manager" (Ex. B.). This is the only place on the application for the approval referred to in the language immediately above Gibbons' signature. Before being sent to the General Manager for approval, the Superintendent makes his recommendation with reference to the employment of the applicant immediately above the point where the General Manager signifies his approval (R. 174).

Gibbons testified that he believed he read the application before he signed it (R. 94). It is clear therefore that he knew it was necessary that his application for employment be approved by the General Manager, and that he knew he was assigned to work as a "temporary" employee until his application was approved.

Where the parties to a contract specify that acceptance should be given in a certain manner, then acceptance in any other manner is insufficient. The rule is stated as follows in *Volume I, Restatement of the Law of Contracts*, Section 61:

> "ACCEPTANCE OF OFFER WHICH STATES PLACE, TIME OR MANNER OF ACCEPTANCE.
>
> "If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract * * * ."

The requirement that the application for employment be approved by the General Manager serves a real purpose in promoting the safety and efficiency of the operation of the railroad. First of all, the references of the applicant are checked to determine his past history (R. 167). Secondly, the superintendent determines whether the prospective employee bears promise of rendering satisfactory service. If these requirements are met, the superintendent then makes his recommendation upon the application of the prospective employee and mails it to the General Manager for his approval (R. 174).

The time within which these prerequisites to the approval of the General Manager can be completed is from thirty to sixty days (R. 180). Gibbons, the petitioner in this case, did not work as a fireman as long as thirty days at any time or as long as sixty days in the aggregate (R. 220).

Numerous cases have recognized the necessity for such a probationary period to permit the investigation of a prospective employee's qualifications and physical condition. In *Walling vs. Nashville, C. & St. L. Ry.* 155 F. (2d) 1016, C. C. A. 6 (1946), the court said:

> "The persons involved were in training for positions as porters, callers, messengers, stenographers and clerks, who were commonly called 'posters' and as firemen, switchmen and brakemen, who were commonly called 'cubs.' It is uncontroverted that in each of these different positions a period of preliminary training is essential to the efficiency of the applicant therefor, as well as his safety and that of the public. It would be unthinkable to subject the lives of employees and passengers, to say nothing of property, to the hazards which would arise from the use of untrained and incompetent servants. A training period is mandatory."

Since the respondent sought to perform its duty to its other employees and to the public by requiring final approval of an application for employment by its General Manager, after certain preliminary steps had been taken, approval by any other person is not sufficient. A principal cannot be bound by the act of an agent without authority, particularly in a case where the limitation upon the agent's authority is brought home to the person dealing with him, as it was here by the language on Gibbons' application which read: "If put to work, I understand that my employment is only temporary until this application is approved."

Thus, under the evidence, the lower courts were clearly correct in holding that petitioner's employment was only temporary until approval of his application by the General Manager.

2. The Requirement of Approval By the General Manager Was Not Waived By the Respondent Under All the Evidence in This Case.

In the petitioner's amended complaint, he alleged that "some time prior to August 1, 1929, the defendant in writing accepted plaintiff's said application for employment" (R. 2). In the opening statement of petitioner's counsel, he said: "The evidence will show that the plaintiff did receive a letter advising him that he was accepted as an employee" (R. 33).

In the opening statement, respondent's counsel said: "I understand from Mr. Brady's statement that the plaintiff expects the evidence to show that he received a letter notifying him that his application had been approved" (R. 48, 49). Respondent's counsel further said: "The keystone of the case, it seems to me, is whether a letter was written to the plaintiff and received by him, by someone having authority to write such a letter, in 1929, stating that his application had been accepted" (R. 53).

At the close of the petitioner's case and in support of respondent's motion for judgment, counsel for respondent said: " * * * I stated in the opening statement, the receipt of this notice that his application had been accepted, which was alleged in the petition, was the keystone of the whole case. I think I used those very words, that was the keystone of his case, and the keystone seems to be missing" (R. 152).

The foregoing summarizes the position of respondent. There was no evidence of any kind that the application for employment, signed by Gibbons, was ever approved by the General Manager of the respondent.

Petitioner no longer claims that he has or ever will have such evidence. He now contends that the appearance of his name on certain rosters of the respondent (Petition, p. 13, Question 1) or the performance of work by the petitioner (Petition, p. 13, Question 3), or the delivery to him by J. F. Hazel, respondent's Superintendent of Motive Power, of a recommendation for employment addressed "To all concerned" (Petition, p. 13, Question 4) amounted to a waiver of the clear requirement apparent on the face of his application. This contention flies directly in the face of the fourth finding of fact of the District Court (R. 15).

In order to show a waiver by the respondent of the requirement that the application for employment must be approved by the General Manager, it was encumbent upon the petitioner to show a clear, unequivocal, decisive act by the General Manager which would amount to such a waiver on his part. *The White Company vs. The Canton Transportation Company*, 131 O. S. 190, 198, 2 N. E. (2d) 501, 505 (1936). It must not only be made intentionally but with full knowledge of the circumstances. *Bennecke vs. Connecticut Mutual Life Insurance Co.*, 105 U. S. 355, 359, 26 L. Ed. 990, 992 (1882). In this case, there was no evidence of any act of waiver on the part of the General Man-

ager. His only decisive acts were the rejection of the petitioner's application in 1935 (Ex. G, AA and BB) and the refusal to give him an *ex post facto* seniority date in 1940 (Exs. J and K).

This principle was applied by the Supreme Court of Oklahoma in *C. R. I. & P. Ry. Co. vs Sawyer*, 176 Okla. 446, 56 P. (2d) 418 (1936), a case which we deem persuasive on this question. There, the plaintiff was working in defendant's ticket office in Oklahoma City with a seniority date of May 2, 1919. In 1925, he was offered a position on another division of the railroad, so he consulted with his superior the depot ticket agent, and also the division passenger agent, as to whether the acceptance of the new position would affect his seniority. They advised him that when the new work ceased, plaintiff could return to his old job with his seniority unimpaired. In July, 1926, he was returned to his old job and continued there until September, 1931 when it was abolished. From 1926 to 1931, his name appeared on the roster with a seniority date of May 2, 1919.

When his job was abolished, he sought to bid in another job but was met with the contention that he held seniority only from July, 1926, when he returned to his old job. The defendant concurred in this contention of the Union and the employee holding the job and refused to make the change. Since the plaintiff could not find other work with the defendant, he took other employment after a lapse of seven months.

The plaintiff received a judgment for seven months salary, which was reversed by the Supreme Court of Oklahoma. Concerning the effect of the assurance given plaintiff by his superiors, the court said:

> "They promised him two things: (1) That he should have his old job when he returned to Richard's office; and (2) his seniority should be unaf-

fected. They performed the first, and no complaint is made on that point. The second they did not fulfill.

"The failure of the defendant to make good the promise of its agents in the second particular did not give rise to a cause of action on the part of the plaintiff. It is true, as urged by plaintiff, that defendant, a corporation, can only act through its agents. *American Soda Fountain Co. vs. Stolzenbach*, 75 N. J. Law 721, 68 A. 1078, 16 L. R. A. (N. S.) 703, 127 Am. St. Rep. 822. But this rule exists only with concomitant rules, and one of these is that an agent ordinarily cannot act for or bind the corporation in matters not within the scope of the agent's authority. The alleged agreement of these agents of defendant to preserve the seniority of plaintiff was beyond the power of the corporation, and, under the overwhelming evidence of this record, the agreement touched upon a matter wholly without the scope of the authority, apparent or real, of these agents. * * * The defendant cannot be bound by this agreement nor suffer for its breach, unless estoppel enters in."

The court then turned to the question of estoppel and stated that an estoppel could not arise because there was no false representation or concealment, saying:

" * * * It cannot be said that the representation was falsely made or that any known fact was concealed. It cannot be said that plaintiff was without knowledge or without means of knowledge."

The appearance of the petitioner's name on four seniority rosters cannot amount to a waiver of approval of his application by the General Manager because, as found by the trial court, there was no evidence that the General Manager had any knowledge of this fact. It cannot amount to an estoppel because there was neither any intentional

deception of the petitioner nor any reliance by him upon the fact that his name did appear on the roster. In fact, he did not even know his name was removed from the roster. The petitioner failed to establish facts upon which an estoppel could be based because he did not show any intentional deception on the part of the respondent or that he had been mislead to his injury. See *Brant vs. Virginia Coal and Iron Co.*, 93 U. S. 326, 335, 23 L. Ed. 927, 929 (1876).

Neither could the performance of work by the petitioner operate as an estoppel to prevent the respondent from claiming that such employment was only temporary until his application was approved. The necessary prerequisites to approval of his application have already been pointed out in this brief. Clearly, all of these matters could not be determined until the applicant had performed at least some service and during this period his employment was probationary, or as stated in the application "temporary."

The letter addressed by J. F. Hazel, petitioner's friend (R. 200) and creditor (Ex. C), "To all concerned" was nothing more or less than a recommendation permitting him to obtain employment elsewhere. It was accurately interpreted by the trial court in remarks made during the course of the trial as follows:

> " * * * I might say to counsel that so far as this communication 'To whom it may concern' goes, I don't believe that I could place the importance on it that counsel for plaintiff seems to feel that it carries. * * * Now this was not an attempt at the time of its dictation to be a communication from the railroad to the plaintiff assuring him of a position and in effect making of itself an agreement or contract of employment. It was a letter that was designed

> to help the plaintiff to obtain employment; so that I don't place the importance on that that counsel seemingly does in his treatment of that document. * * * " (R. 158, 159).

Furthermore, the "To all concerned" letter was not even an accurate statement of facts known to Hazel. The petitioner had not been in the employ of Shore Line "for some little time" as Hazel said, nor was the statement that he "will be returned to service" justified in view of the letter which Hazel had theretofore received, dated February 28, 1935, from the General Manager stating that John Gibbons, who had applied for work as a fireman, should not be employed (Ex. AA). Perhaps Hazel was just a little anxious to get his loan repaid.

CONCLUSION

We believe that the foregoing answers all of the questions raised by the petition filed herein, and shows that the determination of them involves a review of the evidence in this case and this case alone. No federal question is presented.

There is only one further point we have not covered which is involved in the statement of the third question presented by the petitioner. This question inquires whether the employer-employee relationship could be terminated except in accordance with the Brotherhood agreements after petitioner became a regular fireman. Obviously, this statement begs the entire question. We maintain that he never became a regular fireman and both of the lower courts have so held.

The petitioner's application for employment, which he read, showed on its face that it was to be approved by the General Manager of the respondent. It was not so approved. Such approval was never waived by respondent and the trial court so found. These findings were affirmed by the Court of Appeals. Consequently, the petitioner never acquired any seniority rights and since this suit is based upon an alleged violation of seniority rights, the petitioner failed to establish his case. All of this involves primarily a consideration of questions of fact and the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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